ACCIDENTAL DISABILITY WEBINAR: REMANDS & MEDICAL PANELS

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PART II: REMANDS

ACCIDENTAL DISABILITY: REMANDS

Frequent Reasons Why PERAC Must Remand Board Approvals of Disability Applications

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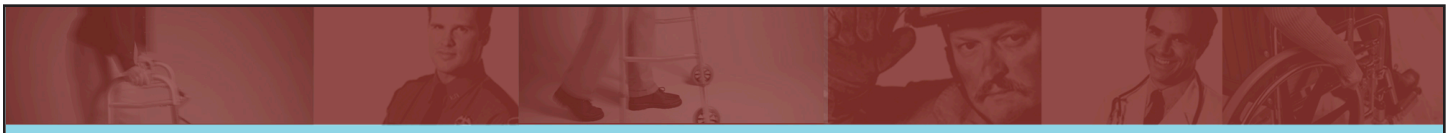
29



Introduction

- Retirement boards may approve or deny applications for accidental and ordinary disability retirement (and accidental death benefits).
- If there is a negative medical panel, the board cannot approve the application.
- If there is a positive medical panel, the board may approve or deny the application.
- In the alternative to approval or denial, the board may seek clarification from the medical panel (840 CMR 10.11(2)) or petition PERAC for a new panel (840 CMR 10.11(3)).
- If the board approves the application, it gets sent to PERAC for review, pursuant to G.L. c. 32, Section 21(1)(d).

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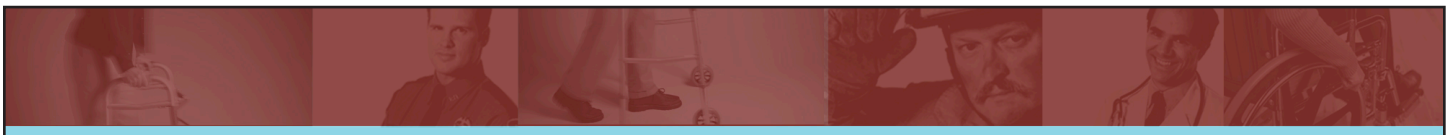

Section 21(1)(d)

- Under this statute, PERAC is authorized to review all disability retirements granted by the retirement boards.
- PERAC may remand an application back to the retirement board if it finds that the decision of the board was:
  - Made upon unlawful procedure;
  - Unsupported by substantial evidence;
  - Arbitrary or capricious; or
  - A result of fraud or misrepresentation.

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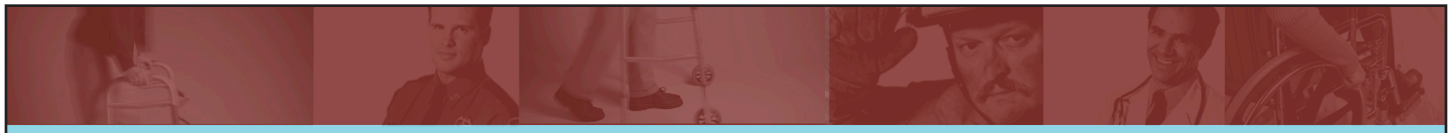

Unlawful Procedure

- Sounds harsh: is PERAC accusing the board of breaking the law?
  - No—It just means that the board failed to follow a procedural requirement.

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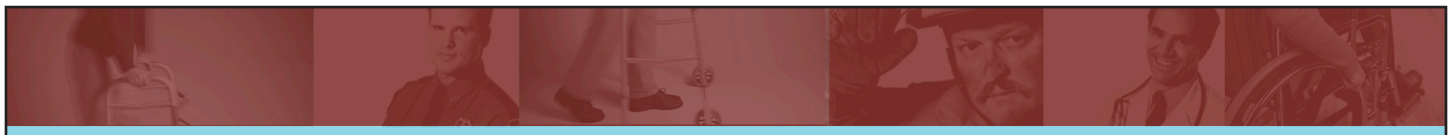

Lack Of A Positive Medical Panel

- A positive medical panel certificate is a condition precedent for the award of accidental and ordinary disability retirement.
- A negative certification as to incapacity and/or permanence will always be fatal to any disability application.
- A negative certification as to causation will always be fatal to an application for accidental disability.
  - **EXCEPTION:** A retirement board may decide that a medical panel's negative answer on causation was based on an improper standard in a PRESUMPTION case only.

33

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Missing Documents

- Sections 6 and 7 (and 16 for involuntary applications) and 840 CMR 10.00 et seq require that applications for disability retirement must include certain documents.
  - Ex. Treating physician statement, job description, the employer's statement, pre-employment physical examinations (for presumption cases), etc.

34

Failure To File Via Prosper

- On July 17, 2017, PERAC issued Memorandum # 22/2017 to all retirement boards. In this memorandum, we instructed:
  - …[A]s of Tuesday, September 5, 2017, approved disabilities and death benefits submitted for the Legal Unit's review under G.L. c. 32, §§ 21(1)(d) and 21(4) will only be accepted via PROSPER. We will not be able to accept either paper submissions or e-doc submissions after that date.

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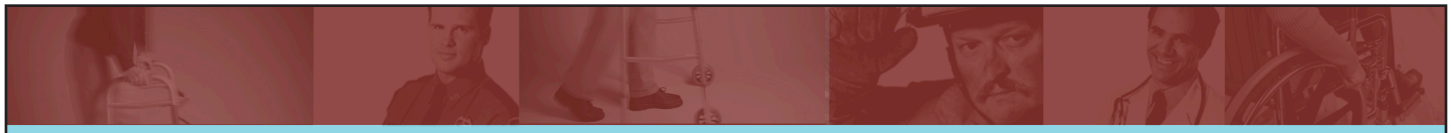

Ordinary Disability Only

- The most common reason for the remand of an ordinary disability application is the lack of the requisite number of years of service.
- Most boards require at least 10 years of service.
- Three boards require 15 years.
- Veterans are eligible for an ordinary disability retirement with 10 years of service, regardless of whether they are members of those three systems.

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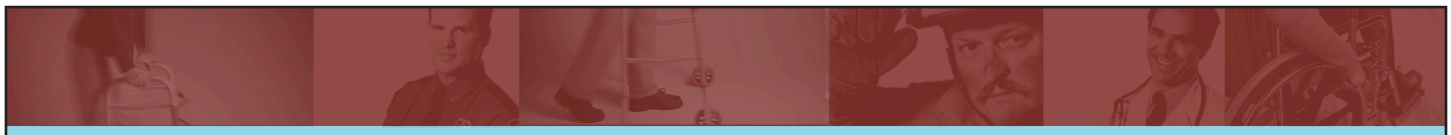

Involuntary Applications Only

- Applications for involuntary disability require the employer to include a statement of facts. Failure to include can result in a remand.
- Section 16(1)(a) "Any head of a department who is of the opinion that any member employed therein should be retired for superannuation, ordinary disability or accidental disability, in accordance with the provisions of section five, six, or seven, as the case may be, may file with the board on a prescribed form a written application for such retirement. Such application shall include a fair summary of the facts upon which such opinion is premised." (Emphasis added.)

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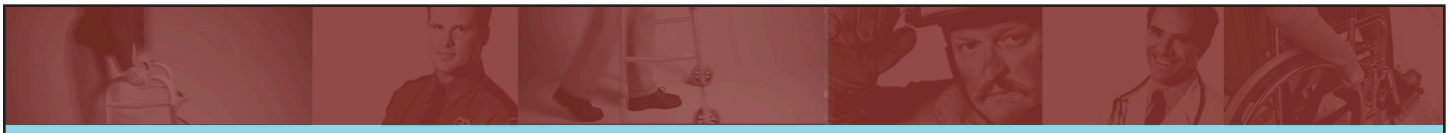

Unsupported By Substantial Evidence

- As stated, the vast majority of PERAC remands are because the application is unsupported by substantial evidence.
- The following slides touch on the general categories of reasons why PERAC most often has to remand an application.
- Each category will be followed by some examples of actual remands PERAC has drafted in the last several years.

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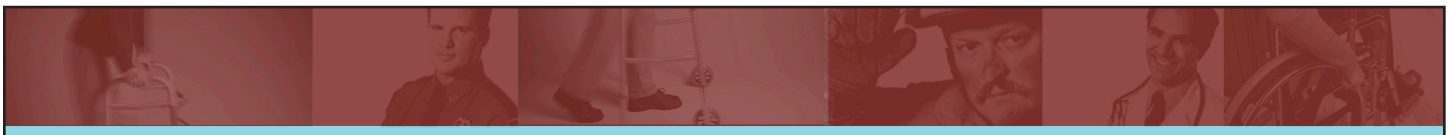

Not Injured While "in the performance of his [or her] duties"

- Pursuant to Section 7, to be eligible for accidental disability retirement, one must be injured "as a result of, and while in the performance of" one's duties.
- Sub-categories of incidents fall under this requirement. An applicant is not entitled to an accidental disability benefit if they are injured while engaged in any of the following examples:
  - Sustaining an injury while going to, from or at lunch or on a break;
  - Sustaining an injury while going to, from or in the bathroom;
  - Sustaining an injury on the way to begin work, or after leaving work;
  - Co-worker horseplay; or
  - Performing a duty outside of one's job description, or not performing an actual job duty when injured.

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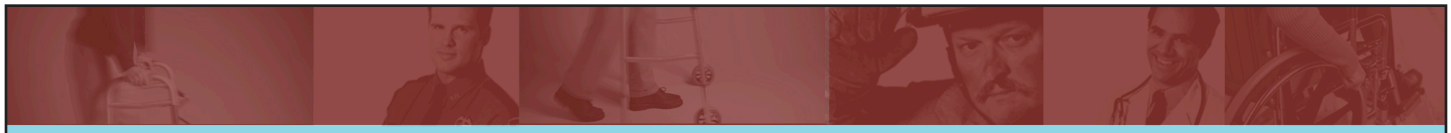

Injured While Going To, From, Or At Lunch Or On a Break

- In 1959, the SJC published two decisions on the same day that created a strict causation standard.
  - In one case, a nurse was injured when she left work to go home for lunch.
  - In the other, a stadium matron was injured while on her way back to work following lunch.
- The SJC determined that, in order to be eligible for accidental disability, an applicant must be going from a work obligation to a work obligation. Neither was found eligible for accidental disability, because one was injured while walking to a non-work obligation, and the other was injured while walking from a non-work obligation.
- This strict causation standard lived on in ***Namvar v. CRAB***, 422 Mass. 1004 (1996), where the SJC determined that Mrs. Namvar was not eligible for accidental disability because she sustained her injury while walking from a non-work obligation – lunch. SJC noted the strict standard, but that it was well-established and must be applied fairly.

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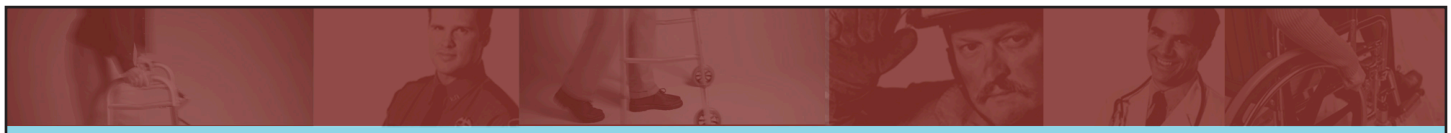

Recent Similar Remands

- Applicant suffered heart attack while eating lunch at home during his shift. He then hopped in his cruiser and drove to the police station.
- Applicant had a stroke while off-duty and at home. Claimed that he was responding to an alarm call, but never left his home.

41

NOTES:

Injured While Going To, From Or While In A Bathroom

- ***Boyle v. PERAC***, CR-99-879 (2000): Member who was standing at sink in the restroom when he blacked out, fell and hit his shoulder was obviously not performing any job related activity at that time.
- ***Doucette v. PERAC***, CR-08-239 (2010): Member who injured herself after she used the bathroom facilities and was on her way to the sink to wash her hands was not in the performance of her job duties.
- ***Larossi v. Boston Retirement Board***, CR-08-591 (2001): Member who was injured while walking toward the sink after using the lavatory was not injured while performing a job duty.
- ***Fortier v. Teachers' Retirement Board***, CR-02-730 (2003): Member walking to urinal to relieve himself when he slipped and fell was not injured while in the performance of his duties and was not entitled to accidental disability retirement.

42

Recent Similar Remands

- Member was injured while leaving the bathroom and slipping on recently washed hallway floor.
- Member was injured when he slipped while in the bathroom/ locker room at work.

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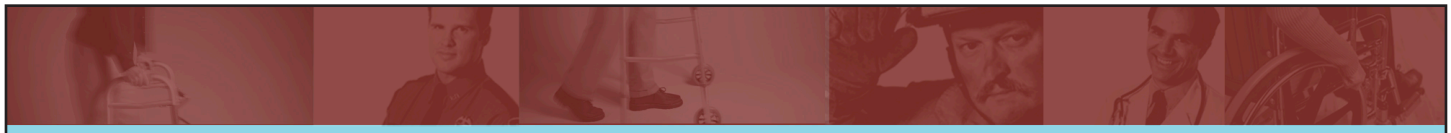

Injured While Traveling To Or From Work

- The similar strict standard applied to injuries sustained while going to or leaving a bathroom or a break apply here, too.
- Key issue is whether the member was going from a work obligation to a work obligation: If not, the member is not eligible for accidental disability.
- Oftentimes, there is ambiguity regarding whether the member's work shift has started or ended at the time of injury. As the board is the finder of fact, very important for boards to investigate and attempt to clarify any ambiguity.

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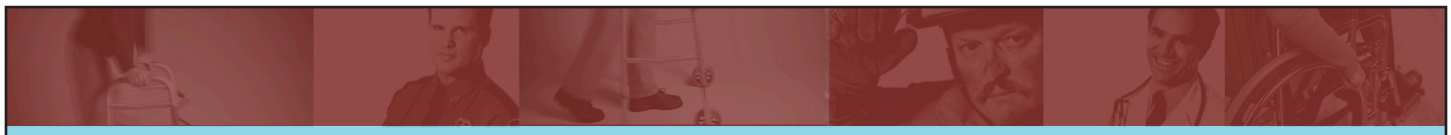

Recent Similar Remands

- Injured while in her work facility, but before arriving at her station to begin her work shift.
- Injured while walking to her car in the parking lot, after her shift ended.
- Injured when she fell after leaving work.
- Injured when he slipped in parking lot "pre-shift."
- Injured while driving to a training site to start her day. Although she only traveled this route because of a work obligation (training), she was not traveling from a work obligation.
- Injured in the parking lot on the way to work.
- Injured while driving to work. Argued he was in the performance of his duties because he is required to drive and was in a state vehicle.

45

NOTES:

In The Actual Performance Of His Or Her Job Duties

- Member must be performing an actual job duty at the time of injury.
- Must be on duty when injured.
- Must be a nexus between the member's injury and the actual performance of his or her job.

46

Co-Worker Horseplay

- In order to qualify for accidental disability retirement, the injury must "be sustained 'in the line of duty'…that is, during the actual performance of the duties that the employee has undertaken to perform on behalf of the public." ***Damiano v. Contributory Retirement Appeal Bd.***, 72 Mass. App. Ct. 259, 263 (2008).
- In Damiano, the member was a dispatcher who sustained an injury during unexpected "horseplay" with a colleague. Appeals Court determined that the injury was not sustained "in the line of duty."

47

NOTES:

Recent Similar Remands

- Dispatcher sustained injury while attempting to perform a somersault.
- Laborer sustained injury while throwing and catching a football with a colleague.

48

Not Performing An Actual Job Duty

- In ***Connolly v. CRAB***, 73 Mass. App. Ct. 1127 (2009), the member sustained a back injury while replacing a water cooler bottle.
- Appeals Court determined that he was not eligible for accidental disability retirement because he was not injured "as a result of, and while in the performance of, his duties..." (Emphasis added). He did not have a duty to replace the water cooler bottle.
- The phrase is construed narrowly, and requires that a distinction be drawn between actual performance of work and something incidental to such work.

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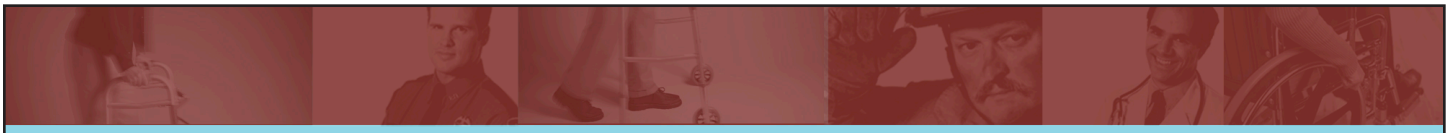

Recent Similar Remands

- Engineer sustained injury while moving a filing cabinet.
- Mental health counselor sustained injury while attempting to move a dumpster with colleagues.
- Security guard sustained injury while helping someone move boxes.

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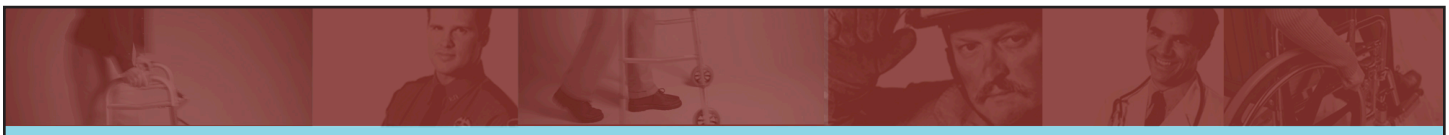

No Injury Report

- Unless the injury was sustained within 2 years of the application, the application must include:
  - Written notice of the injury filed within 90 days of the injury.
- **OR**
  - Proof of receipt of Workers' Compensation payments on account of such injury.
- **OR**
  - A member not covered by Workers' Compensation and not in Group 1 may satisfy the written notice requirement if there is a record of such injury "on file in the official records of his department."

51

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What Is NOT An Injury Report?

- Affidavits recounting events of long ago written today, or more than 90 days after event.
- Workers' Compensation settlements.
- Newspaper articles.
- Typed or written pieces of paper with no letterhead and no indicia of authenticity.

52

Recent Similar Remands

- Group 4 member claimed PTSD following several traumatic incidents. Remanded because the member failed to provide incident reports of such incidents. Recent affidavit from a superior about such incidents was insufficient evidence.
- Group 4 member claimed PTSD related to several specific incidents but failed to provide the relevant incident reports.
- Although the member provided an injury report, the report failed to identify the circumstances of the injury and/or what job duty he was performing at the time of injury. (Neither the employer nor the board provided any additional information.)

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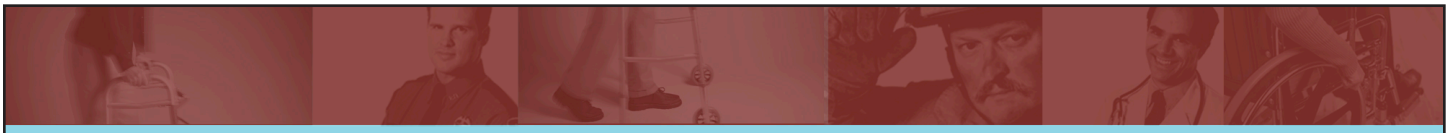

Bona Fide Personnel Action

- An emotional injury arising principally out of a bona fide personnel action cannot constitute a personal injury fur purposes of Section 7 and cannot be compensable unless such action is found to amount to intentional infliction of emotional distress.
- Examples of what can constitute bona fide personnel actions:
  - Termination
  - Transfer
  - Reassignment
  - Suspension
  - Demotion

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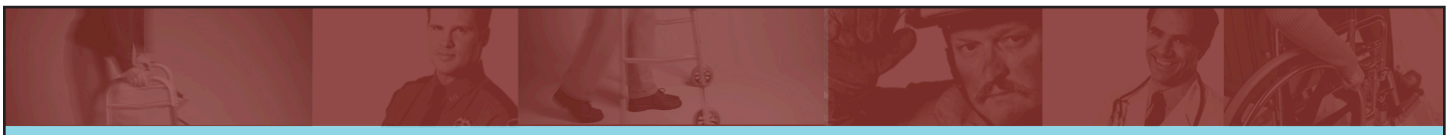

Recent Similar Remands

- Member claimed PTSD following being informed that he would be terminated. He was not entitled to accidental disability retirement because the termination was a bona fide personnel decision that did not arise to the intentional infliction of emotional distress.
- Member who claimed PTSD following being transferred to a different job duty and shift was not entitled to accidental disability retirement, because the member's employer was permitted to transfer him and there was no evidence that the transfer was done with the intent to inflict emotional harm.

55

NOTES:

Applicant Is Still Working

- To qualify for accidental or ordinary disability retirement benefits, a member must be "unable to perform the essential duties of his job…"
  - A person continuing to work without accommodations does not qualify.
  - Also, a person who works without limitation up until his or her mandatory retirement cannot establish that his or her injury made him or her unable to perform the essential duties of the job.

56

Recent Similar Remand

- Member was a building custodian. In 2012, he injured his shoulder and subsequently was given an accommodated position, which he worked until 2018, when he applied for accidental disability for the 2012 shoulder injury. Which position should the medical panel evaluate to determine whether he is disabled?
  - The accommodated position. In ***Foresta v. CRAB***, 453 Mass. 669, 680 (2009), the SJC determined that an employer may assign an employee to an accommodated position to avoid the award of accidental disability retirement, provided that the accommodated position's essential duties are similar in responsibility and purpose and there is no loss of pay or other benefits.

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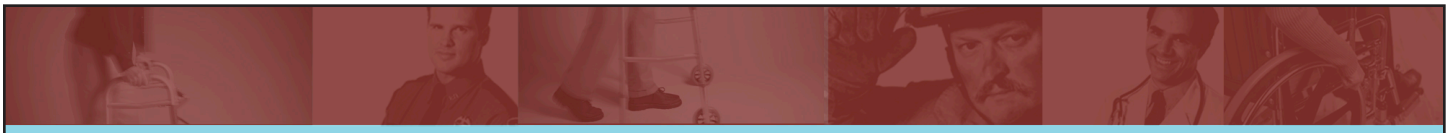

Undefined Injury

- Section 7 provides that an applicant's disabling condition must be "… by reason of a personal injury sustained or hazard undergone…"
- Often, it is unclear what body part sustained the injury and/or for what injury the applicant seeks accidental disability retirement.
- Often, the alleged disabling condition does not match the injury report or the medical records.

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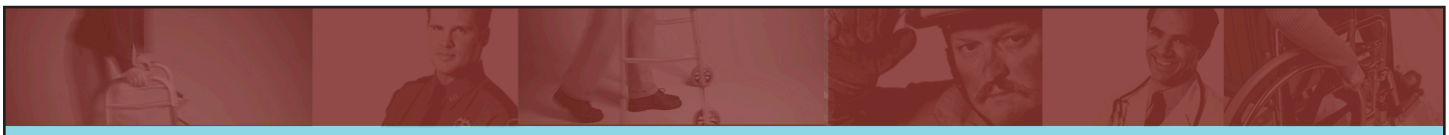

Recent Similar Remands

- Injury report says the member injured his right shoulder, but the member seeks accidental disability for a left hand injury.
- Injury report says the member injured his left knee, but the member seeks accidental disability for a back injury.

59

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Common Movements

- In ***Adams v. CRAB***, 414 Mass. 360 (1993), the petitioner claimed that the constant standing, sitting, bending, and walking that she was required to do as a teacher caused her back pain that left her permanently disabled from performing her job duties.
- The SJC held that the petitioner was not entitled to accidental disability for such a common "wear and tear" injury.
- "…job duties involving common movements done frequently by many humans both in and out of work will not be sufficient to establish an entitlement" to accidental disability retirement benefits.

60

Recent Similar Remands

- Security guard was not entitled to accidental disability for a lower back injury allegedly caused by having to wear a heavy belt and gear while walking his rounds.
- Corrections Officer was not entitled to accidental disability for a heel spur allegedly caused by walking rounds and climbing stairs while wearing heavy gear.
- Sales representative was not entitled to accidental disability for a neck injury allegedly caused by frequently cradling a telephone between her neck and left shoulder.

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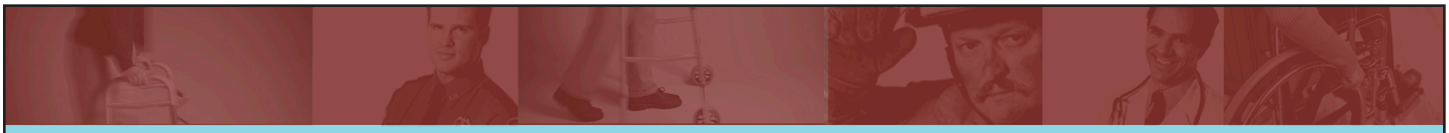

Presumptions

- For certain public safety personnel, any condition of impairment to health caused by hypertension or heart disease shall be presumed to have been suffered in the line of duty (Section 94).
- For Firefighters, any condition of impairment of health caused by any disease of the lungs or respiratory tract shall be presumed to have been suffered in the line of duty (Section 94A).
- For Firefighters, any condition of cancer affecting certain areas of the body shall be presumed to have been suffered in the line of duty (Section 94B).

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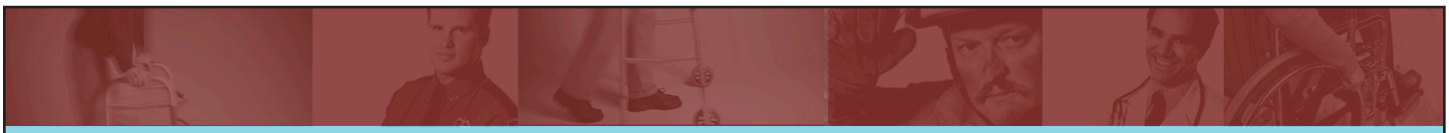

Presumption Overcome

- Member has a congenital heart or lung condition.
- Member has not provided proof that he/she successfully passed a physical examination on entry into service or subsequently passed a physical examination that failed to reveal any evidence of a heart or lung condition.
- The presumption… "is lost when it is shown by competent evidence that [the] disabling heart condition was not suffered… in the line of duty." ***Hayes v. City of Revere***, 24 Mass. App. Ct. 671 (1987).
- Firefighter served in the position for less than 5 years. (Cancer Presumption).
- Retired Firefighter discovers cancer more than 5 years after retirement. (Cancer Presumption).

63

NOTES:

Recent Similar Remands

- Application under the Heart Law was remanded because of lack of pre-employment physical or subsequent employment physical.
- Member was not entitled to Heart Law because he was diagnosed with a congenital heart condition.
- Police Officer retired for superannuation. One year later, he applied for accidental disability under the Heart Law. Remanded, because it was unclear that he was incapacitated from performing his duties while still a member in service. See ***Vest v. CRAB***, 41 Mass. App. Ct. 191 (1996).

64

Recent Similar Remands

- Member was not eligible for the Heart Law because his pre-employment physical revealed evidence of heart conditions.
- Member was not eligible for the Lung Law because his pre-employment physical revealed evidence of obstructive lung problems.
- Member was not eligible for the Cancer Law because his cancer was not discovered within 5 years of his retirement.

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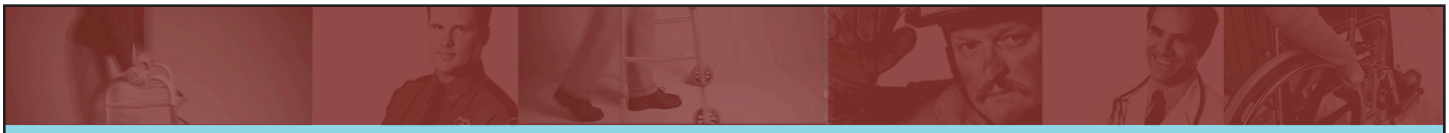

Conclusion

- PERAC approves the vast majority of the applications it reviews.
- Each application is reviewed by two attorneys.
- Some of the reasons why PERAC must remand an application may be resolved at the board level by way of findings of fact.
  - In fact, many of the remands mentioned today were eventually approved following the board making findings of fact.

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COMMONWEALTH OF MASSACHUSETTS
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